

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: PERMISSIBLE TESTIMONY

Fuening does not prohibit the State from presenting evidence of the defendant's signs of intoxication, nor does it bar the State from presenting the officer's opinion that the defendant's conduct appeared to be affected by alcohol.

The State of Arizona, by and through the undersigned, respectfully requests this Court to deny the defendant's Motion in Limine re: Permissible Language, for the reasons provided in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION:

The defendant has filed a Motion in Limine to preclude the State's witness, Officer Brian Marston, from expressing opinions as to whether the defendant committed the crime of driving while intoxicated by stating that the defendant "was under the influence" or any variation thereof. The defendant has included a list of potential terms that he claims this Court should preclude the officer from using, including:

- a. "Was under the influence;"
- b. "Was impaired;"
- c. "Showed signs of impairment;"
- d. "Was intoxicated," "drunk," "tipsy," or any such euphemism or synonym;
- e. "Was unable to perform part of the field sobriety test;"
- e. "Showed or exhibited signs of impairment or which were consistent with being impaired;" and/or
- g. Any other opinion which tends to express guilt of the charge, i.e. "testimony which parrots the words of the statute;" and/or

h. Any opinion of what the law and statutory intent are regarding the charged offense.

The defendant has cited *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1984) to support his motion. However, the defendant's contention is overbroad and twists *Fuenning* well beyond its meaning. Further, the defendant ignores the case law that has interpreted *Fuenning*.

STATEMENT OF LAW:

Fuenning does disfavor a witness from usurping the decision of ultimate issue of fact, which is guilt or innocence. *Fuenning*, however, did not create a *per se* rule of exclusion. See *State v. Bojorquez*, 145 Ariz. 501, 502-503, 702 P.2d 1346 (App. 1985). Instead, the court is to weigh the probative value of the testimony against its prejudicial effect under Rule 403, Ariz. R. Evid. *Fuenning*, 139 Ariz. at 600, 680 P.2d at 131. See also *Newell v. Town of Oro Valley*, 163 Ariz. 527, 530, 789 P.2d 394 (App. 1990) [Where a police officer's opinion on a party's intoxication is not the ultimate issue for the jury, it is error to preclude it.]

Witness testimony that the defendant was "under the influence," "drunk," or "intoxicated" are statements that encompass an opinion as to a single element of the offense and not the ultimate question of guilt or innocence. *Fuenning* allows such questioning as long as the witness does not usurp the determination of the ultimate question:

It ordinarily would be proper to ask the witness in such a case whether he or she was familiar with the symptoms of intoxication and whether the defendant displayed such symptoms. The witness might be allowed to testify that defendant's conduct seemed influenced by alcohol. However, testimony which parrots the words of the statute

moves from the realm of permissible opinion which “embraces *an*” issue of ultimate fact (Rule 704) to an opinion of guilt or innocence, which embraces all issues.

Fuenning, 139 Ariz. at 605, 680 P.2d at 136 [emphasis in original]. Intoxication or being under the influence of alcohol is only one element of driving under the influence under A.R.S. § 28-1381(A)(1). Officer Marston may not testify that the defendant is guilty, but he may testify as the observations he made of the defendant and the conclusions that his training and experience led him to draw from those observations.

The defendant’s motion is incredibly overbroad in that it seeks to prohibit the State’s witness from testifying about any of his observations. It borders on the ridiculous to exclude witness testimony that the defendant “showed signs and symptoms of impairment” and similar statements, when those statements are expressed by a police officer who has been specially trained in observing such signs and symptoms. It is unclear what, if anything, the defendant would actually allow Officer Marston to testify about.

Fuenning specifically allows Officer Marston to testify whether he observed the signs and symptoms of intoxication. Arizona law also allows the witness to testify whether the defendant’s conduct seemed to be influenced by alcohol and whether he was impaired. *Id.* See also *State v. Superior Court [Blake, Real Party in Interest]*, 149 Ariz. 269, 718 P.2d 171 (1986) (Horizontal Gaze Nystagmus results are admissible if foundational requirements met.)

This Court must determine whether the probative value of Officer Marston’s testimony is substantially outweighed by any unfairly prejudicial impact. Officer Marston is being called to testify as to his training and experience with observing alcohol

impairment, the observations he made of the defendant, and his conclusions based on those observations. He is not being called to testify as to whether the defendant is guilty. Such evidence is highly probative and relevant but not unfairly prejudicial.

Therefore, the State respectfully requests this Court to deny the defendant's motion.